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No. 40

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

ISKA W. CARMACK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The first opinion of the circuit court of appeals is reported in 135 F. 2d 196. The memorandum opinion of the district court after trial upon remand (R. 600–618) is reported in 55 F. Supp. 555. The second opinion of the circuit court of appeals (R. 655) is reported in 151 F. 2d 881.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 6, 1945 (R. 660). The petition for a writ of certiorari was filed on Febru-

ary 6, 1946 and was granted on April 22, 1946 (R. 661). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a taxpayer, property owner, and heir of the grantor to the city of property sought to be condemned, has standing to object to the taking when she has no property interest in the land.

2. Whether, under a statute authorizing the Federal Works Administrator, acting jointly with the Postmaster General, to condemn for post offices such sites "as he may deem necessary", a petition to condemn property already devoted to public use may properly be dismissed on the grounds that, in the opinion of the court, the selected site is not necessary for the public project because other sites are available; condemnation of the selected site will interfere with local governmental functions; and the property is held in trust for the specific purpose to which the land is being devoted.

3. Whether, if Courts may decide the legislative question of the necessity for the taking, the selection as a site for a federal post office of property used for a city park and courthouse was arbitrary and capricious under the facts of this case, and particularly in the light of the approval of local public officials and a majority of local voters.

STATUTE INVOLVED

Section 1 of the Act of May 25, 1926, c. 380, 44 Stat. 630, as amended by the Act of July 1, 1939, 53 Stat. 1426, 1427, 40 U. S. C. 341 provides, in part:

> To enable the Federal Works Administrator to provide suitable accommodations in the District of Columbia for the executive departments, and independent establishments of the Government not under any executive department, and for courthouses, post offices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings of the classes under the control of the Federal Works Agency in the States, Territories, and possessions of the United States, he is hereby authorized and directed to acquire, by purchase, condemnation, or otherwise, such sites and additions to sites as he may deem necessary, and to cause to be constructed thereon, and upon lands belonging to the Government conveniently located and available for the purpose (but exclusive of military or naval reservations), adequate and suitable buildings for any of the foregoing purposes, giving preference, where he considers conditions justify such action, to cases where sites for public buildings have prior to May 25, 1926, been acquired or authorized to be acquired, and to enlarge, remodel, and extend existing public buildings under the control of the

Federal Works Agency, and to purchase buildings, if found to be adequate, adaptable, and suitable for the purposes of sections 341, 342, 343, 344, 345, 346 and 347 of this title, together with the sites thereof, and to remodel, enlarge, or extend such buildings and provide proper approaches and other necessary improvements to the sites thereof. When a building is about to be constructed on a site acquired prior to May 25, 1926, and such site is found by the Federal Works Administrator to be unsuitable for its intended purpose, he is hereby further authorized and empowered to acquire a new site in lieu thereof by purchase, condemnation, exchange, or otherwise, and except in case of exchange to dispose of the present site by public sale and to execute the necessary quitclaim deed of conveyance: *Provided,* That in carrying into effect the provisions of sections 341, 342, 343, 344, 345, 346, and 347 of this title, insofar as relates to buildings to be used in whole or in part for postoffice purposes, the Federal Works Administrator, under regulations to be prescribed by him, shall act jointly with the Postmaster General in the selection of towns or cities in which buildings are to be constructed and the selection of sites therein: *Provided further,* That all sketches, plans, and estimates for buildings shall be approved by the Federal Works Administrator and the heads of the executive departments which are to be located in such building.

The Federal Works Administrator is authorized to carry on the construction work herein authorized by contract, or otherwise, as he deems most advantageous to the United States.

* * * * *

STATEMENT

This is a proceeding instituted by the United States to condemn land as a site for a United States Post Office, Customhouse and Court House in the City of Cape Girardeau, Missouri (R. 29–30). The site is a section of a city park on which are located a court house used by the Court of Common Pleas of Cape Girardeau County, a city library, a bandstand and two memorial monuments (R. 44). The land was originally conveyed in 1807 to the District (now County) of Cape Girardeau by deed of Louis Lorimier which recited that "a Court House and Prison" having been erected on land which he proposed to set aside for a "Seat of Justice," he did thereby "give grant alien convey and confirm [certain described land] unto * * * the * * * Commissioners and assessors in behalf and for the use of the District of Cape Girardeau * * * to be and remain forever Common and public and never to be appropriated to private use * * * in fee Simple" (R. 21–22). In 1814, the seat of Justice having been moved to Jackson, Missouri, the judges of the Court of Common Pleas quit-

claimed the tract here involved along with others to the heirs of Louis Lorimier (R. 102–103). In 1820, the heirs of Louis Lorimier quitclaimed to the inhabitants of the Town of Cape Girardeau several tracts for particular public uses, and other tracts, including the one involved here, without mentioning a specific public use, the land to "remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property" (R. 106–107).

The petition, filed November 22, 1941, sought condemnation of the land and all improvements thereon except the library building (R. 2–9). The City and County of Cape Girardeau, the heirs of the donor of the park property and all others who might claim an interest in the property were named defendants (R. 2–3). The respondent, an heir of Louis Lorimier and a taxpayer and property owner in the City, was the only defendant to contest the petition. The district court found that the respondent had no interest which would permit her to maintain the defenses which she asserted and entered a preliminary decree of condemnation on March 5, 1942 (R. 601).

Upon appeal by respondent, the decree was reversed. *Carmack* v. *United States,* 135 F. 2d 196. The court stated that, conceding that Mrs. Carmack had no such interest as would entitle her to participate in compensation payable for the prop-

erty, "she would seem to have more than the general interest of a nonproperty-owning inhabitant", and held that she "had such special interest as entitled her to object to the property being taken for a purpose destructive of the public use to which it had been dedicated by her ancestor". 135 F. 2d at 199. It concluded that the district court therefore erred in not permitting her to maintain her defenses. The court then stated that in the absence of express statutory authority or direction to take property already devoted to another public use, that authority has been denied unless the legislation as to the specific project is such as to give rise to an implication that such property might be taken, and held that, under the circumstances presented, no necessity for taking this particular property already devoted to a public purpose was to be implied from the necessity for the proposed public structure. It concluded that whether the determination of necessity by the Acting Administrator of the Federal Works Agency was arbitrary or capricious was an issue which should be decided by the trial court. The decree was reversed on the additional ground that the petition did not allege nor did the evidence show that the Federal Works Administrator and the Postmaster General had acted jointly in selecting the site. 135 F. 2d at 200–201.

After remand, on June 10, 1943, Postmaster General Frank C. Walker and Federal Works Ad-

ministrator Philip B. Fleming, acting jointly, made a formal selection of this site (R. 86–87). Thereafter, a petition for condemnation, amended to allege the joint selection, was filed on August 14, 1943 (R. 27). Again all defendants defaulted except Mrs. Carmack who answered, denying the authority of the United States to condemn the property and the necessity of its taking, and alleging that the selection was made arbitrarily and capriciously (R. 39–55, 634). A hearing was had on these questions in April 1944 (R. 55). The United States presented documentary and oral evidence of the matters leading to the recommendation of this site by the Joint Committee, consisting of the Fourth Assistant Postmaster General and the Commissioner of Public Buildings of the Federal Works Agency, and the selection by the Postmaster General and Federal Works Administrator. The evidence showed that the relative advantages and disadvantages of some twenty-two proposals were considered (R. 122, 145–146), and that five sites were then selected for further consideration (R. 122, 145). This number was reduced to two and then the site finally chosen was selected (R. 122, 145–146). Mrs. Carmack presented evidence to show that the choice of this site was unnecessary and not to the best interests of the city. Figuring prominently in the evidence of both parties was a proposal by the City of Cape Girardeau, which the United States accepted,

to exchange the property involved in these proceedings for the present federal building (R. 63–76, 421–433). The exchange was proposed by local officials and has their full support and that of an impressive number of business men in the city, as well as the local postmaster (R. 18–21, 63–76, 92–93, 162–165, 175–176, 188–189, 199–201, 417–434, 620). The majority of the qualified voters in the City approved it (R. 349–350, 421–433, 509). The building which now houses the Court of Common Pleas of Cape Girardeau County "has been so devoured by termites [that] the floors are propped up by struts and timber braces, to prevent them from falling through at possible cost of life" (R. 553). The exchange would save the city "a large sum of money" (R. 178, 188, 190, 424, 497, 555). It would likewise result in a financial saving to the United States, since "no other acceptable offer for an exchange or sale of the present [Federal] property is securable" (R. 176, 497, 519, 555). In the event of exchange, provision was made for the uninterrupted administration of the Court of Common Pleas (R. 63–65, 67, 80, 92). Mrs. Carmack contended that the city lacked authority to convey this property; that, therefore, the agreement was illegal; and that condemnation by the United States of the city property should not be permitted as means of effecting an illegal agreement (R. 46–47).

On May 19, 1944, the district court filed its findings of fact, conclusions of law and a memorandum opinion wherein it ruled in Mrs. Carmack's favor, and a decree dismissing the amended petition was thereafter entered (R. 632–636). The district court found that the public use for which the Government sought to acquire the property was not "superior in rank" to the existing use, that there was other property available better fitted for the Government's project, that failure to secure the site would not result in failure of the Government project, and that condemnation of the site involved would interfere with local governmental functions (R. 629–630). It concluded that the city officials had no power to exchange the property, that there was no necessity for taking the site in question and that the selection of the site by the Federal Works Administrator and the Postmaster General was "arbitrary, capricious and unnecessary" (R. 631–632).

The circuit court of appeals affirmed on the ground that statutory authority did not exist for the condemnation of property already devoted to a public use under the circumstances described, stating that it did not consider the question whether the selection was arbitrary or capricious (R. 656).

SPECIFICATION OF ERRORS TO BE URGED

The courts below erred:

1. In holding that the Federal Works Administrator and the Postmaster General lacked authority to condemn the lands in question.

2. In holding, in effect, that the question of the necessity for taking the lands is a judicial one.

3. In holding that the court can review the good faith determination of the Federal Works Administrator and the Postmaster General as to the necessity for the taking.

4. In passing upon the authority of the city officials to exchange the property when that question was not in issue.

5. In construing the phrase "arbitrary and capricious" to mean unnecessary in the opinion of the court.

6. In holding that the authority to condemn land devoted to public use is more limited than that to condemn private property.

7. In holding that Iska Carmack had standing to contest the condemnation petition.

8. In failing to hold that the condemnation of the property was not arbitrary, capricious or otherwise unlawful.

9. In dismissing the Government's petition in condemnation.

SUMMARY OF ARGUMENT

I

Iska W. Carmack has no standing to attack the validity of these condemnation proceedings since she has no right in the property taken, and stands in no better position than any other taxpayer.

The City of Cape Girardeau holds the property here condemned in fee simple and, there being no reservation of a right of re-entry, or provision for reverter or forfeiture if use for a public purpose should cease, Mrs. Carmack has no right, title or interest in or to the property sought to be condemned.

The mere fact that a person is a taxpayer of a city does not give him a standing to object to condemnation of city property absent a showing of special damage. Since Mrs. Carmack, who was the only one to object to the taking, did not show that she would be specially damaged, she had no standing to contest the proceedings which should not, therefore, have been dismissed.

II

The United States has the Constitutional power to condemn land devoted to prior public use by a State or its political subdivisions. That power has been exercised by Section 1 of the Act of May 25, 1926, c. 380, 44 Stat. 630, as amended, 40 U. S. C. sec. 341, which, in general terms, author-

izes the Federal Works Administrator to acquire such sites as he deems necessary for court houses, post offices and the like. It does not distinguish between the administrative authority to select private and public property as a site for the public project. There is nothing in the legislative history of the statute or any other matter bearing on the legislative purpose, to warrant reading into the statute a restriction on the power of the Administrator preventing him from selecting any site occupied by a political subdivision of a State for a "governmental purpose of equal rank." The rule of law that a statute generally authorizing municipalities, public utilities or other corporations to condemn is not sufficient to authorize the taking of property already devoted to public use, and that such property cannot be condemned in the absence of specific legislation, does not apply to the United States. The reasons for the rule are not relevant to condemnations by the United States. A requirement that Congress specifically approve each selection would seriously embarrass and delay the execution of the Federal purposes since the completion of many federal projects requires the condemnation of property devoted to local public uses such as streets, alleys, public utilities and the like. In any event, the rule would not apply where the prior public user consents to the condemnation.

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III

The holding of the lower court that there was no necessity for taking these lands because other sites were available for the post office and that the failure to secure this land would not result in failure of the federal project is beyond the scope of the judicial power. The court's judgment and discretion may not be substituted for that of the officials to whom the responsibility is entrusted by law. The determination of necessity by an administrative officer to whom the authority of selection has been delegated is not subject to judicial review—certainly not in the absence of arbitrary or capricious action. And this is equally true when property already devoted to a public use is condemned.

The action of the administrative officials here was not arbitrary or capricious. The site was not selected hastily or without adequate investigation. In making their selection, the administrative officials considered and evaluated the relative interests of all parties concerned—the Federal Government, the local government, and the citizenry of the municipality. The fact that the administrative officials, in making their selection, considered an exchange of the present federal building and the land on which it is situated for the site chosen, does not make that selection arbitrary and capricious. Such an exchange would be

mutually beneficial and effect a monetary savings both to the city and the Federal Government. These considerations were properly taken into account.

Institution of condemnation proceedings to accomplish the exchange, there being a doubt that the City had authority to convey directly, does not support a conclusion that the administrative action was arbitrary and capricious. There is no evidence that selection of the park site was conditioned upon the legal right of the city to convey it voluntarily. Whether the local authorities had the power to accomplish the exchange is not an issue in this case, in which there is no attempt to enforce a voluntary transfer.

ARGUMENT

I

ISKA W. CARMACK IS NOT ENTITLED TO LITIGATE THE QUESTION IN ISSUE

Unless a person has some right, title or interest in the property taken, he has no standing to challenge the right of the Government to condemn. Thus, in *Benitez* v. *United States,* 141 F. 2d 943, 951 (C. C. A. 1), certiorari denied, 324 U. S. 859, the court concluded that a defendant named in the petition had "no standing to challenge the right of the government, under the applicable condemnation statutes, to condemn the properties for the public use set forth in the

petition for condemnation" since she had lost her interest in the properties when the petition for condemnation was filed. Cf. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 73–74; *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 406–407. Respondent, Iska W. Carmack, claims to have standing to oppose this condemnation proceeding on two grounds.[1] First, she claims an interest in the real estate sought to be condemned as a direct heir of Louis Lorimier, the original grantor (R. 40). Second, she claims to be entitled to oppose the condemnation as a taxpayer and owner of lots in Cape Girardeau, Missouri (R. 40). But the fact that she is included in each of the categories described gives her no standing to contest the condemnation proceeding.

A. *Iska W. Carmack, as an heir of Louis Lorimier, has no such interest in the land sought to be condemned as to give her the right to oppose its condemnation.*—By their deed of 1820, the heirs of Louis Lorimier conveyed the property here sought to be condemned to the inhabitants of the town of Cape Girardeau "for their use, benefit and behoof forever" (R. 106). The deed limited use of certain parcels, not here in-

[1] While the lower court did not pass on this question on the second appeal, it did so in its first decision remanding the case, and the point may, therefore, be raised at this time. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 257–258; *Panama Railroad* v. *Napier Shipping Co.*, 166 U. S. 280, 284; *Smith* v. *McCullough*, 270 U. S. 456, 461.

volved, to specific named purposes and the only restriction on the remaining property was that it should be used for public purposes.[2] There was no reservation of a right of re-entry, or provision for reverter or forfeiture if the use for public purpose should cease (R. 106–107, 625). Under Missouri decisions, the deed of 1820 conveyed a fee simple and not a determinable fee or a fee on condition subsequent. *Chouteau* v. *St. Louis,* 331 Mo. 781, 793, 55 S. W. 2d 299, 301; *Hand* v. *St. Louis,* 158 Mo. 204, 59 S. W. 92; *Williams* v. *St. Louis,* 331 Mo. 1206, 56 S. W. 2d 1050; *Holekamp Lumber Co.* v. *State Highway Commission,* 173 S. W. 2d 938. If the rules of construction set forth in those decisions are applied in the present case, it is evident that the 1820 deed conveyed a fee simple title and that the respondent has no right, title or interest in or to the property sought to be condemned.[3]

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[2] The deed provision reads as follows (R. 107):
"Provided always that the several tracts or parcels of Land thus granted to the Town of Cape Girardeau and the Citizens Thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property."

Although it is not important in the present case, it is questionable whether use for a federal post office would violate this restriction. See *infra,* note 17, pp. 44–45.

[3] The Missouri courts' construction of deeds to real property in that State is, of course, binding on the federal courts. *Thompson* v. *Magnolia Co.,* 309 U. S. 478, 484. Under the same principles, the 1807 deed of Louis Lorimier (R. 21–22)

The circuit court of appeals conceded (135 F. 2d 196, 199) that Mrs. Carmack did not have such an interest as would permit her to share in compensation. Nevertheless, the court held that she did have standing to object to this proceeding, despite the fact that her interest derived only from her kinship with the deceased grantor. *Mott* v. *Morris*, 249 Mo. 137, 155 S. W. 434, relied upon by the court below, is distinguishable and is, in any event, only a decision on local law which is not binding in this condemnation proceeding on the substantive question of standing to sue in the federal courts.[4] The *Mott* case involved land deeded to the trustees of two churches with the provision that "neither church nor its trustees are to convey away its half interest for other than church purposes." The trustees admittedly sought to convey the property for other than church purposes. The court held that the trustees could not alien the trust estate for any except church purposes and that although the heir had no reversionary interest under the terms of her

likewise conveyed fee title. Since the two deeds thus had the same effect, it is immaterial whether the title flows from the 1807 deed, as Mrs. Carmack originally contended (R. 12), or from the 1820 deed, as the court below treated the case on the second appeal (R. 657).

[4] The standing of persons to challenge the right to condemn would seem to be a question of substance and not merely a matter of "practice, pleadings, forms and proceedings" which, under the condemnation statute, Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C. 258, is governed by local law. Cf. *United States* v. *Miller*, 317 U. S. 369, 379–380.

ancestor's grant, she had the right to ask the interference of an equity court to preserve the trust created. The court was careful to limit its decision to "the determination only of the precise case in hand," and pointed out that the case was not one where the execution of the use had become impossible in fact. 249 Mo. at 145. Even if this ruling were authoritative in the federal courts, it would be irrelevant here, since whether the city had power to convey the property is not an issue in this proceeding. See *infra*, pp. 43–44. Hence, any standing Mrs. Carmack might have, in a state proceeding in equity, to enforce the use limitation put upon the property by her ancestor does not encompass a right to challenge condemnation proceedings in which the use limitation is patently irrelevant.

B. *Iska W. Carmack has no standing to oppose the condemnation by reason of her being a taxpayer and owner of lots in Cape Girardeau, Missouri.*— Since she has no property interest in the land sought to be condemned, Mrs. Carmack's position is no different from that of other taxpayers or property owners in the city. The mere fact that a person is a taxpayer of a city does not give him a standing to object to condemnation of city property absent a showing of "special damages, or injury different and distinguished from his injury as a member of the public at large". *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970, 972 (C. C. A. 9), reversed as moot, 289 U. S. 705; *New York Central & H. R. R. Co.* v. *Yonkers*, 103 N. Y.,

Supp. 252; *Bilby* v. *District Court of Ninth Judicial Circuit*, 159 Okla. 268, 15 P. 2d 38. *Cf. Massachusetts* v. *Mellon*, 262 U. S. 447; *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372 (D. Md.); *George W. Armbruster, Jr., Inc.* v. *Wildwood*, 41 F. 2d 823, 830 (D. N. J.); *Antonakas* v. *Anderson Chamber of Commerce*, 130 S. C. 215, 126 S. E. 35.

Nothing in the record of this case indicates that the respondent, as a property owner, would be injured in kind different from others. In fact, paragraphs I (R. 39), V (R. 42), VI (R. 43), and VII (R. 45) of the respondent's answer in the district court, which contain the only allegations in the pleadings that could be construed as alleging injury to a property owner in the city, clearly apply to "the inhabitants, citizens, taxpayers, and lot owners in said City of Cape Girardeau" generally (R. 40). The taxpayers of an area where a federal project is to be located often have divergent views as to the best location for it. Their views are considered by the administrative officer in selecting the site for the project as they were here. (See *infra*, pp. 37–38, 39). To permit persons who have no interest greater than that of other taxpayers of the area to contest the proceedings would seriously encumber the administration of condemnation proceedings.[4]

It is submitted that for the reasons stated, Mrs. Carmack has no standing to object to the con-

[4] See *supra*, note 4, p. 18.

demnation, and, since she is the only party to contest the proceeding, it becomes unnecessary for this Court to consider the matters put in issue by the pleadings.

II

THE ADMINISTRATIVE OFFICERS WERE AUTHORIZED TO SELECT THIS PARTICULAR SITE FOR THE GOVERNMENT POST OFFICE PROJECT

A. *The Federal Government has constitutional power to condemn property already devoted to public use.*—There is, of course, no doubt that here the land is sought to be condemned for public use; *i. e.*, a post office, custom house and court building. The fact that land is already devoted to some local public use does not exempt it from condemnation by the federal government, *Oklahoma* ex rel. *Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 534; *Wayne County* v. *United States*, 53 C. Cls. 417, affirmed, 252 U. S. 574; *United States* v. *Montana*, 134 F. 2d 194 (C. C. A. 9), certiorari denied, 319 U. S. 772; *City of Oakland* v. *United States*, 124 F. 2d 959 (C. C. A. 9), certiorari denied, 316 U. S. 679; *United States* v. *Wheeler Tp.*, 66 F. 2d 977 (C. C. A. 8). By reason of the supremacy clause of the Federal Constitution, U. S. Const., Art. VI, par. 2, the Federal Government has power to condemn such lands regardless of the purpose for which the land is locally used. Thus, the "doctrine of comparative uses" does not apply in con-

demnation proceedings by the United States.[6] As Mr. Justice Holmes stated in *Sanitary District* v. *United States*, 266 U. S. 405, 425: "This is not a controversy between equals." Whenever the constitutional powers of the Federal Government and those of a State or its subdivision come into confliet, the latter must yield. *Florida* v. *Mellon*, 273 U. S. 12, 17; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 527, 534–535. To permit a comparison of uses and a finding of an equal or superior use in a State or its instrumentalities would promote rather than avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. This may not be done. *United States* v. *Allegheny County*, 322 U. S. 174, 183. Thus, there can be no question that the Court below was correct in its statement that "the inherent power of the United States to take the lands in question could not be doubted" (R. 656).

[6] *United States* v. *Tiffin*, 190 Fed. 279 (N. D. Ohio); *United States* v. *Jotham Bixby Co.*, 55 F. 2d 317 (S. D. Calif.), affirmed *sub nom. C. M. Patten & Co.* v. *United States*, 61 F. 2d 970 (C. C. A. 9), reversed as moot, 289 U. S. 705; *United States* v. *Certain Parcels of Land in Town of Denton*, 30 F. Supp. 372 (D. Md.); *United States* v. *60 Acres of Land in Williamson County*, 28 F. Supp. 368 (E. D. Ill.); *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91 (E. D. S. C.); *United States* v. *Parcel of Land*, 32 F. Supp. 718 (D. Del.); *United States* v. *72 Acres of Land*, 37 F. Supp. 297 (N. D. Cal.). "Even a county seat could not endure as an obstruction and barrier to the free exercise of governmental authority." *State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692, 698 (C. D. Mo.).

B. *The administrative officers were authorized by statute to select this site for the public project.*—Section 1 of the Act of May 25, 1926, c. 380, 44 Stat. 630, as amended by the Act of July 1, 1939, 53 Stat. 1426, 40 U. S. C. 341, authorizes the Federal Works Administrator to acquire by purchase or condemnation for post offices and other buildings "such sites and addition to sites as he may deem necessary" provided that the Public Works Administrator and the Postmaster General act jointly in the selection of sites to be used for post offices. The lower court, ostensibly as a matter of statutory interpretation, read into the statute a restriction on the power of the Administrator; it would prevent him from selecting any site, occupied by a political subdivision of a State for "a governmental purpose of equal rank" for which it was held in trust with no power to authorize a different use, where the taking "would, as the District Court has found in this case, materially interfere with necessary local governmental functions". (R. 659). This wholly gratuitous limitation does not purport to be based upon the words of the Act, construction of the statute as a whole, its legislative history,[7] or any other matter bearing on the

[7] There is nothing in the legislative history of the statute evincing a Congressional intent to make the decision of the Administrator subject to judicial review when he chooses a site already devoted to a public use. H. Reps. Nos. 132 and 1223, 69th Cong. 1st Sess.: S. Rep. No. 197, 69th Cong. 1st Sess. Indeed, the minority views expressed in H. Rep. No. 132,

legislative purpose. Thus the decision below cannot be rested upon statutory interpretation.

The only possible basis for the holding would be the existence of a rule of law that general condemnation statutes must be so construed. It was the court's view that because this particular property is devoted to a prior public use, the general legislation is not sufficient to authorize its taking and the property cannot be condemned in the absence of a specific Act of Congress authorizing the taking of the particular property. The argument is not new. It was fully considered and rejected in the case of *United States* v. *City of Tiffin*, 190 Fed. 279 (C. C. N. D. Ohio). It was there pointed out that the contention is premised upon the rule that general legislation does not authorize a taking by a municipal or public service corporation, or other donee of the sovereign, of property already devoted to public use unless the intention of the legislature in conferring authority to that effect has been manifested in express terms or may be implied from the fact that the use claimed is absolutely necessary to the accomplishment of the purpose for which the claimant was created.[8] As

pp. 6, 10, indicate that Congress was aware that it was delegating *in toto* the function of choice, theretofore exercised by it, to an administrative official. In the course of debate on the bill, the point that there was a complete delegation of Congressional authority is repeatedly made. See 67 Cong. Rec. 4023, 4026, 4028, 8354, 8356, 8359, 8494, 8567.

[8] *Adirondack Railway* v. *New York State*, 176 U. S. 335, 349; *Western Union Tel. Co.* v. *Penn. R. R. Co.*, 195 U. S. 594, 597; *City of Norton* v. *Lowden*, 84 F. 2d 663 (C. C. A.

pointed out in the *Tiffin* case, application of the rule would be to ignore the difference in status between the United States, in its relation to lands sought to be devoted to public use, and the parties attempting to condemn in the cases giving rise to the rule. The court stated (190 Fed. at 281):

> * * * The Legislature, speaking the voice of paramount authority over all property, private as well as public, may, it is conceded, authorize the submission of property already in the public use to another public use, even when the conflicting public uses are those exercised by private public service corporations, if it specially determines upon such a course by particular legislation, and the rule invoked but operates to hold this right in the sovereign power until it clearly appears to have been given to some creature of the sovereignty, such as a municipal or public service corporation. The rule, having existence only to protect the sovereign power against its creatures, plainly, we think, may not consistently be offered to obstruct the supreme authority in the exercise of its administrative and sovereign functions.

General legislation like that at bar has been held sufficient to justify the taking for post offices of

10); *United States* v. *Tiffin*, 190 Fed. 279 (C. C. N. D. Ohio); *Old Colony Railroad Company* v. *Framingham Water Co.*, 153 Mass. 561, 27 N. E. 662; *Easthampton* v. *County Commissioners of Hampshire*, 154 Mass. 424, 28 N. E. 298. See *United States* v. *Southern Power Co.*, 31 F. 2d 852, 856 (C. C. A. 4).

public property devoted to a prior public use. *C. M. Patten & Co.* v. *United States,* 61 F. 2d 970 (C. C. A. 9), reversed as moot, 289 U. S. 705; *United States* v. *City of Tiffin,* 190 Fed. 279, 281 (C. C. N. D. Ohio); *United States* v. *Certain Parcels of Land,* 30 F. Supp. 372 (D. Md.); *United States* v. *Parcel of Land,* 32 F. Supp. 718 (D. Del.). In the present case, we are not "dealing with a question of interpretation of the powers of two separate corporations under the laws of a particular State, but with the sovereign and paramount authority of the federal government to acquire property necessary or suitable for a post office, which is clearly within the express grant of power given by the Federal Constitution. * * * the nature of the subject matter necessarily implies that the [Federal Works Administrator and Postmaster General] may select sites already in public use * * *." *United States* v. *Certain Parcels of Land,* 30 F. Supp. 372, 379, 380 (D. Md.); *United States* v. *Parcel of Land,* 32 F. Supp. 718 (D. Del.); *United States* v. *Jotham Bixby Co.,* 55 F. 2d 317 (S. D. Cal.); *C. M. Patten & Co.* v. *United States,* 61 F. 2d 970 (C. C. A. 9), reversed as moot, 289 U. S. 705.

Likewise, general legislation contemplating the acquisition of property for purposes other than post offices consistently has been held to authorize the selection of property already devoted to public uses. *United States* v. *Montana,* 134 F. 2d 194 (C. C. A. 9), certiorari denied, 319 U. S. 772;

Oakland v. *United States*, 124 F. 2d 959 (C. C. A. 9), certiorari denied, 316 U. S. 679; *United States* v. *Eighty Acres of Land*, 26 F. Supp. 315 (E. D. Ill.); *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91 (E. D. S. C.); *United States* v. *Forty Acres, More or Less, of Land*, 24 F. Supp. 390 (D. Idaho); *United States* v. *Sixty Acres, More or Less, of Land*, 28 F. Supp. 368 (E. D. Ill.). "A Congressional intention that the United States have the right to condemn any land necessary to the successful construction of the projects lawfully planned under the legislation here in question, even though such land already be devoted to a public use, is clearly apparent and necessarily implied." *United States* v. *Sixty Acres, More or Less, of Land*, 28 F. Supp. 368, 373 (E. D. Ill.). "Congress has delegated to the President and the Federal Works Administrator [and the Postmaster General] * * * the power to select sites for such * * * buildings as described in this controversy. To hold otherwise would be to say that the United States has no authority to condemn property * * * because a State highway runs through a part of the land sought to be condemned, and to state that the United States, before proceeding further upon this project, * * * must go back to Congress and go through the uncertainty and delay of attempting to obtain additional legislation." *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91, 96–97 (E. D. S. C.).

The court below, in its first opinion, relied on the case of *United States* v. *Southern Power Co.*, 31 F. 2d 852 (C. C. A. 4), as supporting its view that "in the absence of express statutory authority or direction to take property already devoted to another public use, that authority has been denied unless the legislation as to the specific project is such as to give rise to an implication that such property might be taken." *Carmack* v. *United States*, 135 F. 2d 196, 199–200. The case is not referred to in its second opinion and it is presumed that the court no longer regards it as authority to support its position. Certainly the *Southern Power* case cannot be considered as establishing that property devoted to a public use cannot be taken under general legislation. While the Circuit Court of Appeals for the Fourth Circuit stated the general rule invoked by the lower court in this case, it recognized the fact that the rule had not been applied where a sovereign was exercising for its immediate purposes the power of condemnation. It did, however, suggest that it might be applied "where the prior public use could not reasonably interfere with the purpose for which condemnation is authorized" (31 F. 2d 856). It should be remembered that the *Southern Power* proceeding rested on statutes authorizing the acquisition of lands for forest reserves, and the court stated that the presence of power line rights of way could not be thought to interfere with the acquisition of land for forestry purposes. The case

is well analyzed by Judge Chesnut in *United States v. Certain Parcels of Land*, 30 F. Supp. 372, 380 (D. Md.) as follows:

> * * * The court was not there dealing with a case where the power of condemnation was directly resisted, but was rather concerned with what effect a prior condemnation, under congressional power to acquire lands for forestry purposes, had upon an existing right of way for power lines therethrough. Under the particular facts, arising out of prior negotiations between the contending parties, it was held among other things that it would not be equitable to find that the condemnation had destroyed the right of way for the power line. We are dealing here with an entirely different situation.

The condemnation of lands for federal projects, particularly in populated areas, includes, in a great many cases, the taking of property devoted to public use for utility purposes or for streets, alleys, parks and the like. A requirement that Congress specifically approve each selection in such cases obviously would seriously embarrass and delay the execution of the federal purpose. There is no warrant for the imposition of such a limitation on the operations of the Federal Government and certainly there is nothing to indicate that Congress intended to impose such a burden. The decision of the court below, which is the only instance in which the courts have denied authority to condemn publicly owned

property, cannot, therefore, be supported by either reason or authority.

In the opinion below, the circuit court of appeals suggests that unless it be held that a special and specific Act of Congress is required in each instance where publicly held property is sought as the site for a particular federal project, "it would subject the States and their political subdivisions to an interference with necessary local governmental functions at the decision of Federal administrative officials, with possible unfortunate and unnecessary conflicts between State and Federal authority" (R. 659). But, in the instant case, the local authorities are strongly in favor of the Government's project, a majority of voters in the town have approved the plan, and there will be no undue interference, *infra*, pp. 39–40. The possibility that in some other case federal officials might proceed without due regard to the interests of State or local governments might conceivably present a question whether the action in a particular case was arbitrary or capricious, but it does not justify a departure from settled principles of law and a reading into the statute of limitations which Congress has not imposed. Indeed, even if we assume, *arguendo*, that the decision below states the correct general rule as to the condemnation of publicly used property, the rationale for the "rule" would make it inapplicable where the prior user for a public purpose consented to and supported the condemnation.

III

THE COURTS BELOW WERE NOT WARRANTED IN REJECTING THE ADMINISTRATIVE OFFICIALS' SELECTION OF THIS PARTICULAR SITE FOR THE FEDERAL PROJECT

A. *An administrative determination of necessity is not the subject of judicial review.*—Implicit in the holding of the lower court is its view that there was no necessity for taking these lands because other sites were available for the post office and that the failure to secure this land would not defeat the federal project. The court has, in effect, transferred from the Administrator to itself the determination of whether a particular site is necessary. This may not be done. Certainly Congress, by the plain language of the statute, did not evidence an intention to have any entity but the administrative officials determine which particular site should be chosen (see *supra*, p. 3). Moreover, it is well settled that the determination of necessity by an administrative officer to whom the authority of selection has been delegated is not subject to judicial review.*

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* *United States* ex rel. *T. V. A.* v. *Welch*, October Term, 1945, Nos. 528–533; *Boom Co.* v. *Patterson*, 98 U. S. 403, 406; *Shoemaker* v. *United States*, 147 U. S. 282, 298; *Adirondack Railway* v. *New York State*, 176 U. S. 335, 349; *Sears* v. *Akron*, 246 U. S. 242, 251; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Joslin Co.* v. *Providence*, 262 U. S. 668, 678; *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 708–710; *United States* v. *Montana*, 134 F. 2d 194, 197 (C. C. A. 9), certiorari denied, 319 U. S. 722; *United States* v. *243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2), certiorari denied *sub nom. Lambert* v. *United States*, 317 U. S. 698.

And the same rule is applicable when property already devoted to a public use is condemned. *United States* v. *Montana*, 134 F. 2d 194, 197 (C. C. A. 9), certiorari denied, 319 U. S. 772; *Oakland* v. *United States*, 124 F. 2d 959, 964 (C. C. A. 9), certiorari denied, 316 U. S. 679; *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970 (C. C. A. 9), reversed as moot, 289 U. S. 705; *Atlantic Coast Line R. Co.* v. *Sebring*, 12 F. 2d 679, 681 (C. C. A. 5).

In *United States* v. *Montana, supra*, a proceeding to condemn state-owned school lands, the court held that "The federal statute [40 U. S. C. 257][10] does not require proof of 'necessity' but makes that question depend solely on the 'opinion' of the federal officer. It is controlling here." Again, in *Oakland* v. *United States, supra*, the court stated that "the Congress has authorized the Secretary of War to determine the necessity for acquiring such property [a city dock area] and the extent of the taking."[11] The federal district courts have

[10] That statute, the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257, provides:

"In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so."

[11] The Act invoked in that case authorized the Secretary of War to acquire lands "needed for the site, location, construction, or prosecution of works" for various military purposes. Act of July 2, 1917, c. 35, 40 Stat. 241, as amended, 50 U. S. C. 171.

likewise refused to review the administrative determination that the condemnation of property devoted to some public use was necessary for the federal project.[12] In *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 379 (D. Md.), and *United States* v. *Parcel of Land*, 32 F. Supp. 718, 721 (D. Del.), the courts held that property already devoted to a public use might be condemned as a site for a federal post office, and that the only question open on judicial review was whether the administrative selection was arbitrary and capricious.

The lower courts have decided the instant case as though it were an appeal from the decision of the acquiring agencies as to the necessity, wisdom and expediency of locating the post office, custom-house and federal court building on the site selected. The action of the lower courts is clearly without the ambit of the judicial power under the legislation involved. *Decatur* v. *Paulding*, 14 Pet. 497, 515–516; *Atlantic Coast Line R. Co.* v. *Sebring*, 12 F. 2d 679, 681 (C. C. A. 5). Selection of a site involves the exercise of judgment and

[12] *United States* v. *385 Acres of Land, Etc.*, 61 F. Supp. 746, 750 (E. D. Wis.); *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91, 96–97 (E. D. S. C.); *United States* v. *Eighty Acres of Land*, 26 F. Supp. 315 (E. D. Ill.); *United States* v. *Sixty Acres, More or Less, of Land*, 28 F. Supp. 368 (E. D. Ill.); *State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692 (E. D. Mo.); cf. *United States* v. *Forty Acres, More or Less, of Land, Etc.*, 24 F. Supp. 390 (D. Idaho).

discretion. The court's judgment and discretion may not be substituted for that of the officials to whom the responsibility is entrusted by law. *Marbury* v. *Madison,* 1 Cranch 137, 166; *Louisiana* v. *McAdoo,* 234 U. S. 627; *Bragg* v. *Weaver,* 251 U. S. 57; *Joslin Mfg. Co.* v. *Providence,* 262 U. S. 668; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 130–132. Cf. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 303.

The project in this case is not merely the construction of a post office, customhouse and court building but the construction of such a building *in the city selected and upon the site selected* by the officials authorized to make those determinations. The city and site are as integral a part of the project as the purposes for which they were selected. Even though another city or another site might, in the court's opinion, be chosen and the federal purposes thereby reasonably served, nevertheless, in that event, *this project,* which the Postmaster General and Federal Works Administrator have determined to be necessary, would fail. The courts are without power thus to "clog the wheels of government by reviewing the action" of the administrative officers. *Louisiana* v. *McAdoo,* 234 U. S. 627, 632. In *United States* v. *Merchants Transfer & Storage Co.,* 144 F. 2d 324, 326 (C. C. A. 9), the trial court, upon whose opinion respondent relies (Br. in Opp. 32), was criticized because "while protesting to the contrary, the court substituted its judgment on the

question of public necessity for that of the Secretary". In the present case, the lower courts openly substituted their judgment for that of the selecting officials. In so doing they committed error.

The lower court expressly approved the finding of the trial court that there was no necessity for the taking of the land described in the petition for condemnation, apparently basing its approval on the fact that in its opinion a site more desirable than the one chosen exits (R. 658). That opinion presumably rests on the fact that M. J. Deutsch, Site Inspector for the Post Office Department, placed the site chosen as his second choice in his report to the Joint Committee. In addition to the fact that second choice on a list of twenty-two sites is very high, the court overlooked the fact that the report "was not written by the official who had the burden of determining the question of necessity but by a subordinate agent with whom * * * [selecting officials] may or may not have agreed." *United States* v. *Meyer*, 113 F. 2d 387, 392 (C. C. A. 7), certiorari denied, 311 U. S. 706. Such circumstances might have a bearing on the question of whether the action of the Administrator was arbitrary and capricious, but certainly can have no other place in this case since, as has been shown, the issue of necessity is not one for judicial determination.

B. *The action of the administrative officials was not arbitrary or capricious.*—If the broader

view of some of the lower courts is taken, the outermost limit of the judicial power in this case would be to determine whether the selection was arbitrary or capricious.[13] The circuit court of appeals stated that it did not find it necessary to pass upon the question (R. 656). However, it detailed the findings of the trial court which prompted that court's conclusion that the selection "under all the facts in this case, was arbitrary, capricious and unnecessary" (R. 632). To measure the phrase "arbitrary and capricious" by the yardstick of "necessity", as the district court did in this case, is to convert the determination of necessity from a legislative question into a judicial one. To prevent this unauthorized extension of the power of the judiciary, the phrase must be used in its ordinary sense to mean in bad faith or according to one's own will or pleasure, without adequate determining principle.[14] No element of bad faith or lack of

[13] *United States* v. *Meyer*, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706; *Barnidge* v. *United States*, 101 F. 2d 295 (C. C. A. 8); *United States* v. *Thelkeld*, 72 F. 2d 464 (C. C. A. 10), certiorari denied, 293 U. S. 620; *Atlantic Coast Line R. Co.* v. *Town of Sebring*, 12 F. 2d 679 (C. C. A. 5). See also *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970 (C. C. A. 9), reversed as moot, 289 U. S. 705. Compare cases cited *supra*, note 9, p. 31.

Whether the necessity for the taking may be judicially reviewed to this extent is a question which need not be decided in this case since it is plain that the action here taken was neither arbitrary nor capricious. See *infra*, pp. 37–46.

[14] *Fox Film Corporation* v. *Trumbull*, 7 F. 2d 715, 727 (D. Conn.); cf. *Puget Sound Power & Light Co.* v. *Public Utility District No. 1*, 123 F. 2d 286, 290 (C. C. A. 9); *United States* v. *Eighty Acres of Land*, 26 F. Supp. 315, 319 (E. D. Ill.).

reason is present in the evidence in this case. On the contrary, the record reveals many sound reasons, relied upon in good faith, for selecting this site.

1. *The site was not selected hastily or without adequate investigation.*—The Joint Committee, consisting of the Fourth Assistant Postmaster General and the Commissioner of Public Buildings, appointed by the Postmaster General and the Administrator, respectively,[15] held a number of hearings, over an extended period of time, at which every person who so desired was allowed to state his views and present evidence as to the site to be selected (R. 120–126, 297, 482–483, 490, 519, 620–621). Many written reports, letters and opinions were submitted to and considered by the Committee (R. 73–76, 164, 168–204, 421–433, 483, 490, 509–514, 551–557, 620–621). Included among these were detailed studies by M. J. Deutsch, Site Inspector for the Post Office Department, and H. Arthur Tucker, Associate Architect for the Federal Works Agency, both of whom visited Cape Girardeau and made extensive investigations (R. 168–204, 551–557). The Com-

[15] The Committee was appointed pursuant to regulations of the Federal Works Agency and the Post Office Department (R. 148, 150, 532, 563) as authorized by 5 U. S. C. 22, 369; 40 U. S. C. 341, 347. The Act of June 23, 1874, c. 476, sec. 2, 18 Stat. 276, 40 U. S. C. 254, which related to certain details of site selections under a commissioner procedure, has been superseded by subsequent legislation. See 40 U. S. C. 341–345.

mittee met with and repeatedly sought the advice of E. R. Witman, Fiscal Manager of the Public Buildings Administration, and J. F. Betterley, Superintendent of the Division of Post Office Quarters of the Post Office Department (R. 122, 125–126, 128–129, 132, 139, 293, 295–296, 344, 351–352). Twenty-two proposals were "carefully gone over" by the Committee (R. 122, 145, 168–195). From these, five sites were selected for further consideration (R. 122, 145). Finally, the number was reduced to two and then to the one involved in this proceeding (R. 122, 145–146). On April 7, 1941, the Joint Committee presented its selection in the form of a recommendation to the Postmaster General and Federal Works Administrator for approval (R. 150, 191). On the basis of that recommendation of the Committee and its official records, the Postmaster General and the Federal Works Administrator approved the selection on June 10, 1943 (R. 86–87, 536).

2. *The economies to all parties resulting from an exchange properly entered into the deliberations of the administrative officials.*—Despite the showing of the careful investigation made by the administrative officials, the courts below rejected their determination because "the moving cause for the selection of the park as the site for the Federal building" was the proposed agreement to exchange the park property for the present federal building and the land on which it is located (R. 658). The court points out that prior

to the institution of the condemnation proceeding, certain agents of the Public Works Administrator and officers of Cape Girardeau contracted to exchange the property condemned for the old federal building, and that when it developed that the "City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract" this suit was instituted "as a means for accomplishing indirectly an exchange of properties which could not be directly made" (R. 658).

The Mayor and the City Council proposed the exchange and have repeatedly given it their full support (R. 18–21, 63–76, 92–93, 162–165, 175–176, 417–434, 620). The exchange is classed by them as being "to the best interest of the City" (R. 19, 73, 418). The City Attorney actively favors the exchange (R. 620). The majority of the qualified voters in the city, being fully apprised of the provisions with respect to the library, approved it (R. 349–350, 421–433, 509). It is approved by an impressive number of businessmen in the city (R. 176, 188, 199–201), and by the local postmaster who has no financial or personal interest in any of the locations (R. 176, 189). The exchange will save the city "a large sum of money" (R. 178, 188, 190, 424, 497, 555). It is undisputed that the building which now houses the Court of Common Pleas of Cape Girardeau County and the offices of various city officials lacks quality of design and "has been so

devoured by termites [that] the floors are propped up by struts and timber braces, to prevent them from falling through at possible cost of life" (R. 553). The City's interest will be served by acquiring the old federal building and provision is made for the uninterrupted administration of the Court of Common Pleas (R. 63–65, 67, 80, 92).[16] The exchange will also save the United States a substantial sum of money, because the present post office building is a one-purpose structure with little value for commercial purposes so that "no other acceptable offer for an exchange or sale of the present government property is securable" (R. 176, 497, 519, 555). The present building cannot be used in connection with a new building, yet to tear it down and build another on that site is regarded by all as a "ruthless destruction of valuable property" (R. 178, 555–556), and the United States would have to secure temporary quarters for the post office and other federal agencies located there (R. 178). The park site would provide an attractive setting for the new federal building which is to be "a thing of beauty and a practical utility" (R. 132, 145, 176, 189). The site is easily accessible (R. 144, 364–365).

[16] The finding of the trial court (R. 630) that local governmental functions "would be interfered with" apparently refers simply to the inconvenience of moving. That is the only basis for the finding since there was no evidence or finding that the old federal building would be inadequate for purposes of the local government.

Thus, such an exchange would be mutually beneficial and effect a monetary saving both to the City and the Federal Government. These financial elements were factors that were properly considered by the administrative officials in making their selection. Indeed, a consideration of the relative costs was a matter that was essential to an intelligent choice. This Court said in *United States* ex rel. *T. V. A.* v. *Welch*, October Term, 1945, Nos. 528–533, slip opinion, pp. 6–7:

> Neither the fact that the authority wanted to prevent a waste of government funds, nor that it intended to cooperate with the National Park Commission detracted from its power to condemn granted by the Act. The cost of public projects is a relevant element in all of them, and the government, just as anyone else, is not required to proceed oblivious to elements of cost. Cf. *Old Dominion Co.* v. *United States, supra* [269 U. S. 55, 56]. And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public. *Brown* v. *United States*, 263 U. S. 78.

Consideration of an exchange does not, therefore, constitute a basis for a conclusion that the selection was arbitrary and capricious. Nor does the assertion of the court below (R. 658) that these condemnation proceedings were instituted as a means of accomplishing indirectly an exchange which

could not be made directly tend to support a conclusion that the administrative action was arbitrary or capricious. If this reasoning were valid, it would mean that condemnation, which is always an alternative for direct purchase, is always arbitrary and capricious.

Moreover, there is no evidence that selection of the park site was conditioned upon the legal right of the city to convey it voluntarily. On the contrary, the record abounds with undisputed evidence that the Joint Committee was informed, prior to its recommendation of April 7, 1941 (R. 191), that the Government could not be assured a valid title to the city property except by condemnation. The report of M. J. Deutsch, Site Inspector for the Post Office Department, to the Joint Committee, dated August 20, 1940, stated that (R. 190): "The question of the City Council's authority to make an exchange of this property is in dispute, but this could no doubt be settled by friendly condemnation proceedings, as the city officials are willing and desirous for the trade." The letter by defendant's counsel, I. R. Kelso, to Mayor Statler, dated August 10, 1940, which was included in the Deutsch report, stated that "the government, upon investigation, might decide that the Mayor and Commissioners do not have the legal right to dispose of the Courthouse park and City Hall and Common Pleas Court Building" (R. 189, 198, 203). In addition, I. R.

Kelso appeared before the Joint Committee on or about September 30, 1940, and outlined in detail the reasons in law why the city lacked power to make a valid conveyance (R. 481–482). The report of H. Arthur Tucker, architect for the Federal Works Agency, to the Joint Committee, dated October 9, 1940, stated (R. 554): "The legal right of the city officials to deed any part of the park to the Government to use, is questioned by some people in Cape Girardeau." The Site Proposal form submitted to all bidders and upon which the city made its original offer of November 26, 1940, which the Government accepted on May 26, 1941, contained two paragraphs *specifically providing for condemnation* (R. 63, 65, 70, 71). The letter of the Acting Administrator of the Federal Works Agency to the Attorney General, dated September 25, 1941, requesting the institution of condemnation proceedings, stated (R. 59): "This Agency has endeavored, without success, to acquire title to the land by voluntary conveyance." All this evidence was before the Postmaster General and the Administrator of the Federal Works Agency when they approved the selection of the Joint Committee on June 10, 1943 (R. 86–87, 536).

Whether the local authorities had the power to accomplish the exchange is not, of course, an issue in the instant case, in which there is no attempt to enforce a voluntary transfer. The city, like any other holder of a base fee, once condemnation proceedings

have been instituted, may stipulate for and receive compensation for the absolute fee. *People of Puerto Rico* v. *United States*, 132 F. 2d 220 (C. C. A. 1), certiorari denied, 319 U. S. 752. And no reason is suggested why the local government does not have power to settle its claim by accepting substitution—the best way of adjusting compensation in such cases. Cf. *Brown* v. *United States*, 263 U. S. 78; *Dohany* v. *Rogers*, 281 U. S. 362; *United States* v. *Miller*, 317 U. S. 369; *United States* ex rel. *T. V. A.* v. *Welch*, October Term, 1945, Nos. 528–533; *Jefferson County, Etc.* v. *Tennessee Valley Authority*, 146 F. 2d 564 (C. C. A. 6), certiorari denied, 324 U. S. 871. The Federal officials have statutory authority to dispose of the old post office building (40 U. S. C. 345 (b)), but if for any reason the city could not accept the federal property in payment, then the selecting officials could re-examine the suitability of the site and either pay the amount of the money award, $430,000 being available for the project (R. 83, 294), or abandon the proceedings entirely. *Danforth* v. *United States*, 308 U. S. 271, 284; *Barnidge* v. *United States*, 101 F. 2d 295, 298 (C. C. A. 8).[17]

[17] The statement of the court below that the local officials lacked authority to accomplish the exchange (R. 658) is, at best, questionable. Under its general power to acquire and hold property and to settle litigation, it would seem that the city may legally make the exchange (see R. 111). In 1820, the heirs of Louis Lorimier quitclaimed to the Town of Cape Girardeau several tracts for particular public uses, and other tracts, including the one involved here, without mentioning

In the light of the foregoing (*supra*, pp. 37–44), it cannot be said that the administrative officials acted "arbitrarily and capriciously" in selecting this particular site. There were sound reasons for the selection which they made. They considered and evaluated the relative interests of all parties concerned—the Federal Government, the local government, and the citizenry of the municipality. The mere fact that the court was of the opinion that some other site might do equally well or even better is beside the point, since Congress has conferred upon the administrative of-

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a specific public use, the land to "remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property" (R. 106–107). The decision in *Board of Regents for Normal School District No. 3* v. *Painter*, 102 Mo. 464, 14 S. W. 938, 940, relied upon by the court below, related to one of the tracts included in the same deed as to which the use was specifically restricted to school purposes. The Missouri court held that a normal school was not a public school and hence not within the meaning of the terms of the grant, and that, therefore, the city could not convey the lot there involved for its establishment. Since the parcel here involved was not dedicated to a specific, limited or defined purpose, the case is not controlling. The Federal Post Office and Court House would certainly constitute a public use and the property exchanged will also be used for public purposes. It seems probable that, under the circumstances of this case, which show that the exchange is to the advantage of the city and will carry out the purposes expressed by the grantor, the Missouri courts would not hold it void. Cf. *Woodville, Oklahoma* v. *United States*, 152 F. 2d 735 (C. C. A. 10), certiorari denied, October Term 1945, Nos. 1022–1023; *United States* v. *302 Acres of Land, More or Less, Etc.*, 51 F. Supp. 56, 60–61 (S. D. N. Y.).

ficers and not the courts the duty of selecting the city and site for these buildings, and the availability of other sites does not of itself indicate arbitrary or capricious action. *United States* v. *Certain Parcels of Land,* 30 F. Supp. 372, 379 (D. Md.).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court below should be reversed.

Respectfully submitted.

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